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No. 95-8836

Supreme Court, U.S.
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# In the Supreme Court of the United States

OCTOBER TERM, 1995

ELLIS WAYNE FELKER, PETITIONER

*v.*

TONY TURPIN, WARDEN

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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109 pp

## QUESTIONS PRESENTED

1. Whether Title I of the Anti-Terrorism and Effective Death Penalty Act of 1996 (the Act), and in particular Section 106(b)(3)(E) of the Act, 28 U.S.C. 2244(b)(3)(E), is an unconstitutional restriction of the jurisdiction of this Court.

2. Whether and to what extent the provisions of Title I of the Act apply to petitions for habeas corpus filed as original matters in this Court pursuant to 28 U.S.C. 2241.

3. Whether application of the Act in this case is a suspension of the writ of habeas corpus in violation of Article I, Section 9, Clause 2, of the Constitution.

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### INTEREST OF THE UNITED STATES

This case presents three questions regarding the scope and constitutionality of the habeas corpus provisions contained in Title I of the Anti-Terrorism and Effective Death Penalty Act of 1996. The United States has an important interest in the resolution of those issues. In the Court's order granting certiorari and specifying the questions to be briefed, the Court invited the Solicitor General to file a brief expressing the views of the United States.

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 9, Clause 2, of the U.S. Constitution (the Suspension Clause), and Article III of the

Constitution, in relevant part, are set forth in an appendix to this brief, App., *infra*, 1a-2a, as are Title I of the Anti-Terrorism and Effective Death Penalty Act of 1996, App., *infra*, 2a-23a, and Chapters 153 and 154 of Title 28 of the United States Code, as amended (showing new material italicized and deleted material bracketed), App., *infra*, 24a-53a.

## STATEMENT

In 1983, after a jury trial in the Superior Court of Houston County, Georgia, petitioner was convicted of first-degree murder, rape, aggravated sodomy, and false imprisonment; he was sentenced to death on the murder count. The conviction was upheld on direct appeal to the Georgia Supreme Court, and this Court denied certiorari. Petitioner then unsuccessfully sought postconviction relief in state habeas corpus; this Court again denied certiorari. In 1993, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Georgia. The district court denied relief, the court of appeals affirmed, and this Court denied certiorari. The State set May 2-9, 1996, as the execution period. On April 29, 1996, petitioner filed a second state habeas corpus petition, which was denied; the Georgia Supreme Court denied certiorari. Petitioner then sought a stay of execution and applied for leave to file a second federal habeas corpus petition in federal district court, pursuant to Title I, § 106, of the Anti-Terrorism and Effective Death Penalty Act of 1996. On May 2, 1996, the court of appeals denied both the stay of execution and petitioner's application for leave to file a second or successive habeas petition. Petitioner then filed a petition for a writ of



habeas corpus and a petition for a writ of certiorari in this Court. The Court stayed the execution, granted the petition for certiorari, and directed briefing limited to three questions framed by the Court.

1. On the evening of November 24, 1981, 19-year-old Evelyn Joy Ludlam disappeared. Ludlam had arranged to meet petitioner on the day of her disappearance to discuss employment at a leather shop that petitioner owned, and a note found in Ludlam's abandoned car indicated that she had planned to join petitioner and some of his friends for dinner that night. When questioned by police on the evening of November 25, 1981, petitioner admitted that Ludlam had visited his shop the previous day, but stated that Ludlam had left the shop at about 6:00 p.m. when it closed and had driven off alone in her own car. Petitioner further stated that Ludlam was wearing a red dress and a plaid coat when he had last seen her. As the person last known to have seen Ludlam, petitioner, who had been paroled several months earlier on a 1976 aggravated sodomy conviction, became the prime suspect in Ludlam's disappearance and was placed under constant police surveillance.

On December 8, 1981, Ludlam's body was found floating in a creek in rural Georgia, clothed in the same red dress and plaid coat that she was wearing when last seen before her disappearance two weeks earlier. Her body and clothing contained evidence of sexual assault. An autopsy performed by a medical examiner with the state crime laboratory revealed that Ludlam had died of asphyxiation caused by strangling before her body was deposited in the creek. The medical examiner initially placed the time of death at 3 to 5 days before the discovery of Ludlam's

body (at a time when petitioner was under police surveillance); after reviewing air and water temperature data, however, and consulting case studies involving immersion deaths, the medical examiner revised his opinion. He concluded that Ludlam's death may have occurred as early as two weeks before her body was discovered and at a time when petitioner could not account for his presence. On February 4, 1982, Ludlam's body was exhumed for examination by a pathologist. In addition to confirming evidence of sexual assault, the pathologist agreed with the medical examiner's opinion that Ludlam had likely died two weeks before her body was discovered.

The circumstances surrounding Ludlam's disappearance and ensuing sexual abuse were virtually identical to those underlying petitioner's 1976 conviction for aggravated sodomy. In addition, in the months following the discovery of Ludlam's body, police officers conducted multiple warranted searches of petitioner's residence, automobile, and shop. Hair and fiber evidence collected in those searches directly tied petitioner to the crime.

2. In 1983, petitioner was convicted of first-degree murder, rape, aggravated sodomy, and false imprisonment; after sentencing proceedings before a jury, he was sentenced to death on the murder count. On appeal, the Georgia Supreme Court affirmed petitioner's convictions and death sentence. *Felker* v. *State*, 314 S.E.2d 621 (1984). Although recognizing that the evidence was circumstantial and that there was conflicting expert testimony concerning the time of Ludlam's death, the Georgia Supreme Court held that the evidence "compellingly demonstrate[d]" that petitioner had murdered Ludlam and that the evidence also showed that petitioner had



raped and sodomized her. *Id.* at 628, 630-631, 637-638. This Court denied certiorari. *Felker* v. *Georgia*, 469 U.S. 873 (1984).

3. On December 17, 1984, petitioner filed a state habeas corpus petition collaterally challenging his convictions and sentence. On August 6, 1990, the petition was denied by the state trial court, and on September 3, 1991, an application for a certificate of probable cause to appeal that order was denied by the Georgia Supreme Court. This Court denied certiorari. *Felker* v. *Zant*, 502 U.S. 1064 (1992).

4. On April 27, 1993, petitioner submitted for filing his first federal habeas corpus petition under 28 U.S.C. 2254; it was formally filed in the district court on June 2, 1993. In it, petitioner challenged his state convictions and sentence on five grounds: (1) that the evidence was insufficient to support his convictions; (2) that the prosecutors violated the rule in *Brady* v. *Maryland*, 373 U.S. 83 (1963), in failing to disclose exculpatory evidence; (3) that his retained trial counsel was constitutionally ineffective during the capital sentencing stage of his trial; (4) that hypnosis was improperly used to refresh the memory of a prosecution witness; and (5) that double jeopardy and collateral estoppel principles barred the admission of evidence concerning his prior conviction for aggravated sodomy. On June 9, 1993, the district court entered an order directing petitioner to amend his habeas petition to include any other alleged constitutional errors or deprivations that he wished to assert. Petitioner did not amend his initial filing.

On January 26, 1994, the district court denied petitioner federal habeas corpus relief. The court of appeals affirmed the denial of federal habeas corpus

relief on May 8, 1995. *Felker* v. *Thomas*, 52 F.3d 907, opinion extended on denial of rehearing, 62 F.3d 342 (11th Cir. 1995). On February 20, 1996, this Court denied certiorari, *Felker* v. *Thomas*, 116 S. Ct. 956, and denied rehearing on April 20, 1996.

5. A state judge then issued an order scheduling petitioner's execution for the period May 2-9, 1996. On April 29, 1996, petitioner filed a second petition for state habeas corpus relief. On May 1, 1996, the state trial court denied the second state habeas petition, and on May 2, 1996, the Georgia Supreme Court denied a petition for a writ of certiorari.

6. On April 24, 1996, the President signed into law the Anti-Terrorism and Effective Death Penalty Act of 1996. Section 106(b)(2) of the Act provides that "[a] claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. 2244(b)(2).



Section 106(b)(3)(A) of the Act provides that, "[b]efore a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." 28 U.S.C. 2244(b)(3)(A). The motion for leave to file a second or successive application in the district court for relief under Section 2254 "shall be determined by a three-judge panel of the court of appeals," 28 U.S.C. 2244(b)(3)(B), which "may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection," 28 U.S.C. 2244(b)(3)(C). The decision of the three-judge panel to grant or deny authorization to file a second or successive application for federal collateral relief "shall not be the subject of a petition for rehearing or for a writ of certiorari." 28 U.S.C. 2244(b)(3)(E).

7. Following denial of his successive petition for state habeas relief, petitioner filed in the United States Court of Appeals for the Eleventh Circuit a motion for a stay of execution and an application for leave to file a second or successive federal habeas corpus petition under Section 2254 in the district court. In his filing in the court of appeals, petitioner asserted (1) that the jury instruction defining "reasonable doubt" at the guilt phase of his trial was constitutionally defective under this Court's holding in *Cage* v. *Louisiana*, 498 U.S. 39 (1990) (per curiam), the retroactivity of which, petitioner asserted, became apparent only after this Court's deci-

sion in *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993);[1] and (2) that his rights under the Eighth and Fourteenth Amendments were violated when a non-physician medical examiner employed by the State "provide[d] [the] sole evidence upon which [the] jury relied to determine the critical issue of time of death" at trial. Pet. App. 25-26. As new evidence supporting the latter claim, petitioner submitted affidavits by two pathologists challenging the qualifications of the state medical examiner who performed the autopsy and the validity of the medical examiner's conclusions regarding the time of the victim's death. See Pet. 22-30. In addition, petitioner argued that the habeas corpus reform provisions of the Anti-Terrorism and Effective Death Penalty Act of 1996 violated the Constitution in multiple respects.

a. The court of appeals concluded that petitioner "failed to show substantial grounds upon which relief might be granted under the new Act." Pet. App. 34. The court of appeals explained that petitioner's *Cage* claim could not be regarded as " 'previously unavailable' to him when he filed his first [federal] habeas petition in 1993," because *Cage* had been decided nearly three years earlier. Pet. App. 25. And, "[e]ven assuming * * * the dubious legal argument

[1] In *Cage*, the jury instruction defined "reasonable doubt" as "such doubt as would give rise to a grave uncertainty" and "an actual substantial doubt," and it stated that "[w]hat is required is not an absolute or mathematical certainty, but a moral certainty." 498 U.S. at 40 (emphasis omitted). This Court held that the instruction was unconstitutional, because it could be interpreted by a juror as allowing a finding of guilt based on a degree of proof that was less than required by due process principles. In *Sullivan*, this Court held that a constitutionally deficient reasonable doubt instruction of the kind at issue in *Cage* could never be harmless error.



that *Cage* was not available to [petitioner] until the *Sullivan* decision was announced," the court of appeals noted that petitioner's initial federal habeas petition was formally docketed on the day after *Sullivan* was decided and that petitioner could have amended his initial petition to include a claim under *Cage*. *Ibid.*

Similarly, the court of appeals held that petitioner's claim, made without support in "any decisional law" (Pet. App. 25), that the Constitution barred sole reliance on the testimony of a non-physician medical examiner to establish critical factual issues in a capital murder trial failed to satisfy the requirements of the Act. The court observed that petitioner was not "rel[ying] on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court," as required by Section 2244 (b)(2)(A). *Ibid.* Nor did petitioner's claim rest on a newly discovered factual predicate that, in the context of all of the evidence, would show that, but for constitutional error, no reasonable factfinder would have found petitioner guilty on the underlying offense, as required by Section 2244(b)(2)(B). First, the court noted that, because the factual predicate for the claim was "apparent on the face of the trial record," it was not newly "discovered * * * through the exercise of due diligence." Pet. App. 25-26. Moreover, even "if proven and viewed in light of the evidence as a whole," the court of appeals found that the facts underlying petitioner's attack on the medical examiner's testimony "would not be sufficient to establish by a preponderance of the evidence, much less by clear and convincing evidence, that but for the alleged constitutional error, no reasonable factfinder

would have found [petitioner] guilty of the underlying offense." Pet. App. 26.

b. Turning next to petitioner's constitutional challenge to the habeas reform provisions of the Act, the court of appeals "ch[ose] to analyze this claim not in the abstract, but instead in terms of whether the Act makes any difference insofar as a second or successive petition raising the claims [petitioner] wants to litigate is concerned." Pet. App. 26.[2] Concluding that petitioner "would not be entitled to any relief even under pre-Act law," the court of appeals held that petitioner "ha[d] failed to show substantial grounds upon which relief might be granted insofar as any constitutional issues involving the Act are concerned." Pet. App. 34.

c. Finally, without deciding whether the Act precludes claims based on innocence as an independent constitutional claim, the court of appeals held that, even if it did, petitioner had failed to establish the existence of a valid claim of actual innocence. Pet. App. 33.

d. Because petitioner had not made a prima facie showing of entitlement to collateral relief either under

[2] The court of appeals noted that Section 107 of the Act, which creates special procedures that apply on federal habeas corpus to capital cases arising in States that have adopted an approved mechanism for the appointment and compensation of counsel for condemned prisoners in state collateral proceedings, see 28 U.S.C. 2261-2266, was inapplicable to this case, as "[t]here is no contention * * * that the State of Georgia has shown—or even had an opportunity to show—that it qualifies to benefit" from the special procedures. Pet. App. 24 n.1. Accordingly, the court of appeals expressly declined to address the validity of the special capital procedures contained in Section 107. *Ibid.*



the Act or under preexisting law, the court of appeals denied both his motion for an order authorizing the filing of a second or successive federal habeas petition in the district court and his request for a stay of execution. Pet. App. 34.

8. On May 2, 1996, petitioner filed in this Court an application for a stay of execution, a petition for a writ of habeas corpus, and a petition for a writ of certiorari. On May 3, 1996, this Court granted petitioner's application for stay of execution of sentence of death, granted certiorari, and requested expedited briefing limited to three questions.[3]

## SUMMARY OF ARGUMENT

I. Title I of the Anti-Terrorism and Effective Death Penalty Act of 1996 does not unconstitutionally restrict the jurisdiction of this Court. Under the Act, an applicant for habeas corpus, before filing a second or successive habeas petition in federal district court, must seek leave from a court of appeals and establish a prima facie case of eligibility for habeas relief under the standards of the Act. § 106(b)(3)(A) and (C). The court of appeals' grant or denial of leave to file is neither appealable nor subject to review in

[3] "The parties shall submit briefs limited to the following questions: (1) Whether Title I of the Anti-Terrorism and Effective Death Penalty Act of 1996 (the Act), and in particular Section 106(b)(3)(E), 28 U.S.C. § 2244(b)(3)(E), is an unconstitutional restriction of the jurisdiction of this Court. (2) Whether and to what extent the provisions of Title I of the Act apply to petitions for habeas corpus filed as original matters in this Court pursuant to 28 U.S.C. § 2241. (3) Whether application of the Act in this case is a suspension of the writ of habeas corpus in violation of Art. I, § 9, clause 2 of the Constitution." *Felker* v. *Turpin*, No. 95-8836, Order (May 3, 1996).

this Court on petition for certiorari. § 106(b)(3)(E). Title I of the Act, however, does not divest this Court of its jurisdiction to entertain original petitions for habeas corpus. Nor does it deprive the Court of the opportunity, in the exercise of that jurisdiction and on certiorari review of second or successive habeas petitions that courts of appeals authorize to be filed, to review questions that may arise regarding application of the Act. In those circumstances, Title I does not work an unconstitutional restriction of the jurisdiction of this Court.

Article III of the Constitution provides that this Court has appellate jurisdiction over enumerated categories of cases, "with such Exceptions, and under such Regulations as the Congress shall make." Art. III, § 2, Cl. 2. From the first Judiciary Act of 1789, Congress has exercised that power by selectively defining the authority of this Court to exercise appellate review. The consistent practices of past Congresses establish that Article III does not mandate that this Court have appellate jurisdiction over every case that falls within the coverage of the "judicial Power."

This Court's precedents support the view that Title I does not unconstitutionally restrict the jurisdiction of this Court. In *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869), the Court upheld a law withdrawing this Court's appellate jurisdiction to review a habeas corpus determination made by a lower court. In *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1869), the Court made clear that the law involved in *McCardle* did not divest the Court of its jurisdiction to hear original habeas corpus actions. In similar fashion, Title I of the Act precludes review of a court of appeals' "gatekeeping" determination on a request



to file a second or successive habeas petition in federal district court, but leaves open the avenue, available under 28 U.S.C. 2241 and 2254, for a habeas petitioner to file an original petition in this Court.

Congressional action to restrict this Court's appellate jurisdiction may raise difficult and important constitutional issues. This Court has not recently addressed those questions, nor does this case raise a difficult constitutional issue. Under any of the prevailing theories regarding those issues, Section 106(b) of Title I of the Act, and Section 106(b)(3)(E) in particular, would not be an unconstitutional restriction of the Court's jurisdiction.

II. Title I does not divest this Court of its power to entertain an application for a writ of habeas corpus filed as an original matter in this Court pursuant to 28 U.S.C. 2241. That provision vests this Court with jurisdiction to issue writs of habeas corpus on the ground that a person is in state custody in violation of the Constitution, a federal statute, or treaty. Nothing in Title I amends that provision. Nor does any other provision of Title I implicitly limit the Court's original habeas jurisdiction.

The substantive restrictions on the filing of a second or successive habeas petition in Section 106(b)(1) and (2), however, do apply to this Court's consideration of such a habeas application. The text of the Act makes clear that the substantive restrictions are applicable to any second or successive habeas corpus application filed under 28 U.S.C. 2254, and Section 2254 applies to habeas corpus petitions entertained by this Court, as well as by the lower federal courts. Accordingly, the Court's consideration of original second or successive habeas applications is governed by the substantive provisions of Section 106(b).

III. The application of the Act in this case does not unconstitutionally suspend the writ of habeas corpus, in violation of Article I, Section 9, Clause 2, of the Constitution. That Clause states that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

The Court has often remarked that, as understood at the time the Constitution was ratified, a prisoner could not invoke habeas corpus to challenge confinement pursuant to a conviction entered by a court of competent jurisdiction. And as embodied in federal statutory law, habeas corpus (with narrow exceptions) was not made available to a prisoner held in *state* custody until 1867. The implications of those circumstances in defining the privilege of the writ of habeas corpus protected by the Suspension Clause need not be explored in this case. It is not a suspension of the writ to place reasonable restrictions on the filing of a second or successive habeas corpus petition. The restrictions in Section 106(b) are generally reasonable. And, as applied to petitioner, who seeks to file a second habeas corpus petition challenging procedures at his trial, the restrictions of the Act are constitutional.

## ARGUMENT

### I. TITLE I OF THE ACT DOES NOT UNCONSTITUTIONALLY RESTRICT THE JURISDICTION OF THIS COURT

Under Article III of the Constitution, "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Art. III, § 1. "The judicial Power shall extend



to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." Art. III, § 2, Cl. 1. The jurisdiction of this Court is described by Article III, Section 2, Clause 2, which states:

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

Section 106(b)(3)(A) of the Anti-Terrorism and Effective Death Penalty Act of 1996 provides that, "[b]efore a second or successive application [for habeas corpus] permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." Section 106(b)(3)(E) provides that "[t]he grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." Those provisions thus limit the availability of appeal or certiorari from the court of appeals' "gatekeeping" determination. Title I of the Act, however, does not unconstitutionally restrict the jurisdiction of this Court. The Act does not deprive this Court of its jurisdiction under 28 U.S.C. 2241 to entertain original petitions for a writ of habeas corpus. Nor does the Act restrict or interfere with this Court's interpretation of Title I as applied in habeas corpus cases that a court of appeals authorizes to be filed. Whatever the constitutional limits

on Congress's power to restrict this Court's appellate jurisdiction, Title I is a permissible exercise of Congress's power under the Exceptions and Regulations Clause.

### A. The Constitution Does Not Require Congress To Extend This Court's Appellate Jurisdiction To The Full Scope Authorized By Article III

1. This Court has recognized the Judiciary Act of 1789, ch. 20, 1 Stat. 73, to be "[a] contemporaneous exposition of the constitution, certainly of not less authority than [*The Federalist*]." *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 420 (1821) (Marshall, C.J., for the Court). See also *Wisconsin* v. *Pelican Ins. Co.*, 127 U.S. 265, 297 (1888) (Judiciary Act of 1789 "was passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, and is contemporaneous and weighty evidence of its true meaning"); *Ames* v. *Kansas*, 111 U.S. 449, 463-464, 469 (1884). The 1789 Act did not confer upon this Court the full measure of appellate jurisdiction permitted by the Constitution, nor did it authorize the Court to review all judgments entered by lower federal courts. Notably, the Act did not provide for appellate review of federal criminal convictions.[4] In civil cases, final judgments of the circuit courts were reviewable on writ of error only where the amount in controversy exceeded $2000. § 22, 1 Stat. 84. The Court was authorized to review the decision of the highest court of a State

[4] The Act authorized this Court to issue writs of habeas corpus (see § 14, 1 Stat. 81-82), which permitted some review in federal criminal cases, but habeas review was substantially narrower than review on appeal or writ of error.



only where the state court had rejected a federal claim. See § 25, 1 Stat. 85-87. Thus, the First Congress understood Article III to permit exceptions from this Court's authorized appellate jurisdiction under the Constitution.

2. In 1802, the Court was given jurisdiction in federal criminal cases where the judges of the circuit court were divided on a question of law. Act of Apr. 29, 1802, ch. 31, § 6, 2 Stat. 159-161. An 1889 statute permitted the Court to exercise appellate review in federal capital cases. Act of Feb. 6, 1889, ch. 113, § 6, 25 Stat. 656. The Court's appellate jurisdiction was further extended in 1891 to include "cases of conviction of a capital or otherwise infamous crime." Act of Mar. 3, 1891 (Evarts Act), ch. 517, § 5, 26 Stat. 827.[5] More generally, the Evarts Act also authorized this Court to review, by appeal or writ of error, the decision of a district or circuit court in "any case that involves the construction or application of the Constitution of the United States"; "any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question"; and "any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States." § 5, 26 Stat. 828. In 1914, the Court was given appellate jurisdiction over state court decisions upholding a federal claim. Act of Dec. 23, 1914, ch. 2, 38 Stat. 790.

Today, the expansion of appellate jurisdiction has conferred on the Court virtually plenary jurisdiction

[5] The term "infamous crime" was construed by this Court to include all offenses punishable by a penitentiary sentence. See *In re Claasen*, 140 U.S. 200, 204-205 (1891).

over decisions of the federal courts of appeals, as well as state courts of last resort on issues of federal law, subject to the exercise of the Court's discretion to grant review. See 28 U.S.C. 1254, 1257. The historical development of the relevant jurisdictional provisions, however, indicates that the Constitution itself has never been thought by Congress to mandate appellate jurisdiction over all lower court decisions resting on federal law.

**B. This Court's Precedents Have Acknowledged Congressional Power To Regulate The Court's Appellate Jurisdiction**

1. From the earliest days of the Nation, this Court has acknowledged that its appellate jurisdiction need not reach the limits of Article III. In *United States* v. *More*, 7 U.S. (3 Cranch) 159 (1805), the Court (per Chief Justice Marshall) dismissed for want of jurisdiction the government's appeal from a circuit court decision sustaining the defendant's demurrer to a criminal indictment. The Court observed that, "if the supreme court had been created by law, without describing its jurisdiction," the circuit court's decision would have been subject to appellate review, because "[t]he constitution would then have been the only standard by which [this Court's] powers could be tested." *Id.* at 173. The Court concluded, however, that, "as the jurisdiction of the court has been described, it has been regulated by congress, and an affirmative description of its powers must be understood as a regulation, under the constitution, prohibiting the exercise of other powers than those described." *Ibid.*

The Court employed similar reasoning in *Durousseau* v. *United States*, 10 U.S. (6 Cranch) 307 (1810). Section 22 of the Judiciary Act of 1789 provided that



final judgments of the circuit courts in civil cases were reviewable on writ of error "where the matter in dispute exceed[ed] the sum or value of two thousand dollars." 1 Stat. 84. The Court in *Durousseau* construed Section 22 as implicitly precluding its exercise of appellate jurisdiction in civil cases where the amount in controversy was less than $2000. And the Court recognized that Congress's power to make "Exceptions" to its appellate jurisdiction underlay the imposition of the jurisdictional amount requirement. The Court (again per Chief Justice Marshall) explained:

> When the first legislature of the Union proceeded to carry the third article of the constitution into effect, they must be understood as intending to execute the power they possessed of making exceptions to the appellate jurisdiction of the supreme court. They have not, indeed, made these exceptions in express terms. They have not declared, that the appellate power of the court shall not extend to certain cases; but they have described affirmatively its jurisdiction, and this affirmative description has been understood to imply a negative on the exercise of such appellate power as is not comprehended within it.

10 U.S. (6 Cranch) at 314.

2. In *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869), the Court upheld, as against an Article III challenge, a provision that withdrew from the Supreme Court's appellate jurisdiction the authority to review habeas corpus decisions of lower federal courts. McCardle was a Mississippi resident "held in custody by military authority for trial before a military commission, upon charges founded upon the publication of articles alleged to be incendiary and

libellous, in a newspaper of which he was editor." *Id.* at 508 (statement of the case). His petition for habeas corpus was denied by the circuit court. *Id.* at 507-508. McCardle appealed to this Court, relying on an 1867 statute that authorized appeals from the circuit courts to the Supreme Court in habeas cases.[6]

While McCardle's appeal was pending, Congress passed the Act of March 27, 1868, ch. 34, § 2, 15 Stat. 44, which repealed the 1867 statute insofar as it authorized appeals to this Court. 74 U.S. (7 Wall.) at 508 (statement of the case).[7] The sponsor of the 1868 Act explained that the Act's purpose was to prevent the Court from utilizing McCardle's appeal "to infringe upon the political power of Congress and declare the laws for the government of the rebel States in every respect unconstitutional." Cong. Globe, 40th Cong., 2d Sess. 2062 (1868) (Rep. Wilson). In the view of Representative Wilson, "it was [Congress's] duty to intervene by a repeal of the jurisdiction and prevent the threatened calamity falling upon the country." *Ibid.*

A unanimous Court dismissed McCardle's appeal for want of jurisdiction. After noting that the Court's appellate jurisdiction "is conferred 'with such exceptions and under such regulations as Congress shall make,' " 74 U.S. (7 Wall.) at 512-513, the Court stated:

[6] See Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 386.

[7] The 1868 Act provided "[t]hat so much of the [1867 Act] * * * as authorizes an appeal from the judgment of the circuit court to the Supreme Court of the United States, or the exercise of any such jurisdiction by said Supreme Court on appeals which have been or may hereafter be taken, be, and the same is, hereby repealed." § 2, 15 Stat. 44 (quoted in *McCardle*, 74 U.S. (7 Wall.) at 508 (statement of the case)).



> The exception to appellate jurisdiction in the case before us * * * is made in terms. The provision of the act of 1867, affirming the appellate jurisdiction of this court in cases of *habeas corpus* is expressly repealed. It is hardly possible to imagine a plainer instance of positive exception.
>
> We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words.
>
> What, then, is the effect of the repealing act upon the case before us? We cannot doubt as to this. Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.

*Id.* at 513-514.[8]

[8] *McCardle*'s discussion of the Exceptions and Regulations Clause is consistent with opinions issued before and since. The Court has made the point in different ways. See, *e.g.*, *United States* v. *More*, 7 U.S. (3 Cranch) at 173; *Durousseau*, 10 U.S. (6 Cranch) at 314 ("The appellate powers of this court are not given by the judicial act. They are given by the constitution. But they are limited and regulated by the judicial act, and by such other acts as have been passed on the subject."); *Barry* v. *Mercein*, 46 U.S. (5 How.) 103, 119 (1847) ("By the constitution of the United States, the Supreme Court possesses no appellate power in any case, unless conferred upon it by act of Congress."); *Daniels* v. *Railroad Co.*, 70 U.S. (3 Wall.) 250, 254 (1866) ("[I]t is for Congress to determine how far, within the limits of the capacity of this court to take, appellate jurisdiction shall be given, and when conferred, it can be exercised only to the extent and in the manner prescribed by law. In these respects

The *McCardle* Court concluded its opinion with the following observation:

> Counsel [see 74 U.S. (7 Wall.) at 509-510 (argument for the appellant)] seem to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of *habeas corpus*, is denied. But this is an error. The act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised.

74 U.S. (7 Wall.) at 515. The Court thus made clear that the 1868 Act did not divest this Court of any jurisdiction that it had possessed before the 1867 Act was passed—in particular, the jurisdiction conferred by the Judiciary Act of 1789 to entertain original petitions for habeas corpus filed by persons held "under or by colour of the authority of the United States." Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81-82. The following year in *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1869), the Court unanimously confirmed that it retained jurisdiction to entertain such original habeas corpus petitions. While the Court noted that the jurisdiction-stripping provision of the 1868 Act at issue in *McCardle* "was, doubtless, within the constitutional discretion of Congress," *id.* at 104, the Court also held that the 1868 Act was

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it is wholly the creature of legislation."); *St. Louis, I.M. & S. Ry.* v. *Taylor*, 210 U.S. 281, 292 (1908) ("Congress has regulated and limited the appellate jurisdiction of this court over the state courts * * *, and our jurisdiction in this respect extends only to the cases there enumerated, even though a wider jurisdiction might be permitted by the constitutional grant of power.").



inapplicable by its terms to the Court's original habeas jurisdiction, *id.* at 105.

3. *McCardle* and *Yerger* indicate that Section 106(b)(3)(E)'s restriction on this Court's certiorari jurisdiction is constitutional. As in those cases, Congress has limited appellate review of habeas corpus decisions made in the lower federal courts, while leaving open original habeas corpus actions filed in this Court. See Section II.A, *infra*. Indeed, while common usage—as reflected in this Court's framing of the second question presented—calls petitions for habeas corpus filed directly in this Court by persons incarcerated under a judgment of conviction "original" petitions, for purposes of Article III, the Court's jurisdiction to consider such petitions is appellate.[9] Moreover, both in considering original habeas actions and in reviewing lower court determinations on second or successive petitions that *are* authorized for filing, the Court may interpret the substantive provisions of Title I. It is true that the Court will have no opportunity to announce (except in dicta) the requirements for a "prima facie showing that the application satisfies the requirements of this subsection," § 106(b)(3)(C), because the court of appeals'

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[9] As Chief Justice Marshall explained, the jurisdiction over such a habeas petition filed in this Court "is clearly *appellate*. It is the revision of a decision of an inferior court, by which a citizen has been committed to jail." *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 101 (1807) (emphasis added). Accord, *e.g.*, *Ex parte Siebold*, 100 U.S. 371, 374 (1880). The consequences of so characterizing the Court's jurisdiction are that (1) the statutory authorization for the Court to entertain such petitions does not expand the Court's "original" jurisdiction in violation of Article III, see *Bollman*, 8 U.S. (4 Cranch) at 100-101 (distinguishing *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803)); and (2) the Court's authority to issue the writ is subject to the Exceptions and Regulations Clause, see *Siebold*, 100 U.S. at 374-375.

determination that a habeas petitioner has or has not made out a "prima facie showing" is not subject to review on certiorari, § 106(b)(3)(E). But the Court's lack of opportunity to articulate the rules applicable to that narrow "gatekeeping" function does not amount to an unconstitutional restriction of its jurisdiction, given that the Court retains jurisdiction to engage in substantive review of original habeas corpus petitions filed in this Court.

### C. Section 106(b)(3)(E) Is Consistent With Theories Articulating Constitutional Limits On The Exceptions And Regulations Clause

The question whether any limitations exist on Congress's power under the Exceptions and Regulations Clause to restrict the jurisdiction of this Court raises difficult constitutional issues. Separation of powers concerns, the Supremacy Clause, and the Court's historic role as expositor of federal law all may influence the delineation of the limits, if any, on Congress's authority. In light of the broad sweep of the Court's jurisdiction under current law, this Court has not recently addressed those issues. Legislative consideration of various jurisdiction-stripping proposals, however, has precipitated considerable scholarly discussion of the subject. Under any of the prevailing theories, Title I of the Act is constitutional.

1. Some scholars have concluded that Article III places no constraints whatever on Congress's authority to limit this Court's appellate jurisdiction. See, *e.g.*, Bator, *Congressional Power Over the Jurisdiction of the Federal Courts*, 27 Vill. L. Rev. 1030, 1038-1041 (1982); Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 Stan. L. Rev. 895 (1984); Van Alstyne, *A Critical Guide to Ex parte McCardle*, 15 Ariz. L. Rev. 229, 260 (1973); Wechsler, *The Courts and the Constitution*, 65 Colum. L. Rev. 1001, 1005-1006 (1965). On that view, Congress's delineation of this Court's appellate jurisdiction is subject to restraint only under independent constitutional principles. There is, for example, general agreement that Congress could not constitutionally restrict the Court's appellate jurisdiction based on a suspect classification such as race or religion. See, *e.g.*, Gunther, *supra*, 34 Stan. L. Rev. at 916-917; Van Alstyne, *supra*, 15 Ariz. L. Rev. at 263. Section 106(b)(3)(E) obviously implicates no such suspect classification.

2. Other scholars, while acknowledging congressional authority to devise "Exceptions" to this Court's appellate jurisdiction, have argued that Congress may not exercise that authority in such a manner as to prevent the Court from performing its "core" or "essential" functions within the constitutional structure. See, *e.g.*, *Hart, The Power of Congress To Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1365 (1953) ("[T]he exceptions must not be such as will destroy the essential role of the Supreme Court in the constitutional plan."); Ratner, *Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction*, 27 Vill. L. Rev. 929, 957 (1981-1982) ("a plenary exceptions-and-regulations power is not consistent with the constitutional plan"; rather, "the clause authorizes jurisdictional exceptions and regulations by Congress that are not inconsistent with the Court's essential constitutional functions"). That view was more recently articulated by

then-Attorney General William French Smith. See 128 Cong. Rec. 9093 (1982) (letter from Attorney General William French Smith to Senator Strom Thurmond) ("Congress may not, however, consistent with the Constitution, make 'exceptions' to Supreme Court jurisdiction which would intrude upon the core functions of the Supreme Court as an independent and equal branch in our system of separation of powers.").

Judged under those approaches, Title I is constitutional. Title I leaves intact this Court's certiorari jurisdiction on direct appeal from both state and federal criminal convictions, its certiorari jurisdiction on state and first federal habeas, and its continuing authority to entertain original petitions for habeas corpus. Those avenues of review ensure that the Court can continue to serve as expositor of the federal constitutional rules governing criminal prosecutions. Contrary to petitioner's suggestion (see Pet. 8), moreover, Section 106(b)(3)(E) will not prevent this Court from construing Title I's new substantive requirements (see Section 106(b)(2)(A) and (B)) governing second and successive federal habeas petitions. Where the court of appeals grants leave to file a second or successive petition for habeas corpus in the district court, the district court's eventual decision to grant or deny the petition will be appealable, and ultimately subject to certiorari review. Original habeas petitions may also be filed in this Court. Thus, questions concerning the proper construction of Section 106(b)(2)(A) and (B) will not permanently evade this Court's scrutiny.

3. Other scholars have expressed the view that *some* federal court must be empowered to exercise jurisdiction over every case in which a federal (or at least a federal constitutional) claim is raised. See



Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 Harv. L. Rev. 17, 67 (1981) ("Some effective form of federal judicial review under article III must be available for claims of constitutional right."); Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. Rev. 205, 211 (1985) ("[T]he judicial power of the United States must extend to certain cases, and must be vested—in either original or appellate form—somewhere in the federal judiciary."); cf. *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 331 (1816) (Story, J.) ("[T]he whole judicial power of the United States should be, at all times, vested, either in an original or appellate form, in some courts created under its authority.").

Section 106 does not run afoul of that proposed principle. State prisoners challenging the constitutionality of their convictions or sentences have multiple opportunities to raise their claims in federal court.[10] Even if a second or successive habeas petition is thought to constitute a distinct case for which a federal forum must be available, the statute permits the court of appeals to exercise jurisdiction to determine whether the petitioner has established a prima facie case of entitlement to relief. And Title I of the Act does not divest this Court of jurisdiction to entertain original petitions for habeas corpus, even where state prisoners have previously sought and been denied federal habeas corpus relief. See Section II.A, *infra*.

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[10] Indeed, as the petition acknowledges (see Pet. 4-5), petitioner has filed three previous petitions for certiorari challenging the validity of his conviction, and was denied relief on the merits of his first federal habeas petition by the district court and the court of appeals.

## II. TITLE I OF THE ACT DOES NOT DIVEST THIS COURT OF JURISDICTION TO ENTERTAIN ORIGINAL PETITIONS FOR WRITS OF HABEAS CORPUS, BUT TITLE I DOES AFFECT THE SUBSTANTIVE STANDARDS GOVERNING THE COURT'S EXERCISE OF THAT JURISDICTION

### A. This Court Retains Authority To Entertain "Original" Petitions For Habeas Corpus

Section 2241(a) of Title 28 provides that "[w]rits of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions." Section 2254(a) of that Title states:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. 2254(a).[11] Those provisions were not amended by Title I of the Act. They provide clear statutory authorization for this Court to entertain "original" petitions for habeas corpus filed by prisoners in state custody pursuant to a judgment of conviction.

Nothing in Title I purports to divest the Court of jurisdiction to entertain original petitions for habeas corpus in appropriate cases. Section 106(b)(3)'s

[11] Section 2242 of Title 28 requires that, "[i]f addressed to the Supreme Court, a justice thereof or a circuit judge [a petition for habeas corpus] shall state the reasons for not making application to the district court of the district in which the applicant is held." Rule 20.4(a) of the Rules of this Court contains the same requirement.



"screening" provisions governing second and successive petitions for habeas corpus do not apply to habeas petitions filed in this Court. Section 106(b)(3)(A) states that, "[b]efore a second or successive application permitted by this section is filed *in the district court*, the applicant shall move in the appropriate court of appeals for an order authorizing *the district court* to consider the application" (emphasis added). Section 106(b)(3)(B) similarly provides that "[a] motion in the court of appeals for an order authorizing *the district court* to consider a second or successive application shall be determined by a three-judge panel of the court of appeals" (emphasis added). The requirement that a petitioner obtain leave from the court of appeals before filing a second or successive petition is thus inapplicable by its terms to petitions filed in this Court. Application of those "gatekeeping" provisions to this Court's exercise of its own jurisdiction, moreover, would effect an anomalous inversion of the federal judicial hierarchy. Particularly in light of Congress's failure to amend 28 U.S.C. 2241(a) and 2254(a), which grant this Court express statutory authorization to entertain habeas petitions filed by prisoners in state custody pursuant to a judgment of conviction, the limitations imposed by Section 106(b)(3)(A) and (B) should not be expanded beyond their apparent meaning.

Nor does Section 106(b)(3)(E) limit this Court's jurisdiction to entertain original habeas petitions. Section 106(b)(3)(E) divests this Court of jurisdiction to review, by appeal or writ of certiorari, a court of appeals' decision granting or denying leave to file a second or successive petition. It does not refer to this Court's original habeas jurisdiction, nor does it purport to amend Sections 2241(a) and 2254

(a) of Title 28. This Court has repeatedly emphasized that, "where two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1018 (1984) (internal quotation marks omitted). Congress's determination that the court of appeals' performance of its "gatekeeping" function with respect to second and successive petitions should not be subject to certiorari review may readily "co-exist" with continuing authorization for this Court to entertain original petitions for habeas corpus in extraordinary cases.

Again, *Ex parte Yerger*, *supra*, is relevant. At issue in *Yerger* was the same 1868 statute involved in *Ex parte McCardle*, which eliminated this Court's appellate jurisdiction over circuit court orders denying petitions for habeas corpus. See Section I.B.2, *supra*. The Court held that the divestiture of appellate jurisdiction effected by the Act should be confined to its terms and should not be construed as eliminating the Court's authority to entertain original petitions for habeas corpus. 75 U.S. (8 Wall.) at 104-106. The same analysis applies here; Section 106(b)(3)(E) does not implicitly oust the Court's jurisdiction to entertain original habeas petitions.

### B. The Substantive Standards In Section 106 Of Title I Of The Act Governing Second And Successive Habeas Petitions Are Applicable To Petitions For Habeas Corpus Filed In This Court

Section 106(b)(1) and (2) of the Act sets forth substantive standards governing second or successive habeas petitions filed in federal court:

> (1) A claim presented in a second or successive habeas corpus application under section 2254 [of Title 28] that was presented in a prior application shall be dismissed.
>
> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—
>
> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. 2244(b)(1) and (2). While Congress expressly limited the "gatekeeping" provision of Section 106(b)(3) to habeas applications "filed in the district court," 28 U.S.C. 2244(b)(3)(A), the substantive standards applicable to second and successive petitions for habeas corpus are generally applicable to petitions filed under 28 U.S.C. 2254. In our view, those standards thus apply to second or successive petitions filed as original matters in this Court.[12]

[12] Because, in our view, the substantive requirements of Section 106 bar the second or successive habeas petition filed by petitioner, see Section III.B., *infra*, we do not address whether other substantive or procedural provisions in Title I of the Act apply to original habeas petitions filed in the Supreme Court. Nor do we consider the construction or constitutionality of these provisions.

The applicability of Section 106(b)(2)'s substantive standards to original petitions filed in this Court is required by the language of the Act. A petition for habeas corpus filed in this Court by a prisoner in state custody constitutes a "habeas corpus application under section 2254." Section 2254(a) states:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court.

28 U.S.C. 2254(a).[13] Section 106(b)(2), in turn, states that a second or successive application under Section 2254 "shall be dismissed unless" the statutory criteria are satisfied. 28 U.S.C. 2244(b)(2). The text of the Act thus makes clear that the substantive standards of Section 106(b)(2)(A) and (B) apply to all habeas petitions filed under Section 2254 by state prisoners who have previously been denied federal habeas relief, including petitions that invoke this Court's jurisdiction to entertain original petitions for habeas corpus. Indeed, a contrary reading of the Act would create an incentive for second or successive habeas petitioners to bypass the lower courts whenever their inability to satisfy the requirements of Section 106(b)(1) and (2) was apparent.

We note that, although this Court is authorized to entertain a second or successive petition for habeas corpus, Rule 20.4(a) of the Rules of this Court states

[13] See also Rule 20.4(a) ("If the relief sought is from the judgment of a state court, the petition shall set out specifically how and where the petitioner has exhausted available remedies in the state courts or otherwise comes within the provisions of 28 U.S.C. § 2254(b).").



that "[t]o justify the granting of a writ of habeas corpus, the petitioner must show that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court." The Rule further provides that "[t]his writ is rarely granted." *Ibid.* Experience has confirmed that admonition; this Court most recently granted an original petition for a writ of habeas corpus more than 70 years ago, in *Ex parte Grossman*, 267 U.S. 87 (1925). See Oaks, *The "Original" Writ of Habeas Corpus in the Supreme Court*, 1962 Sup. Ct. Rev. 153, 153-154 & n.3; Stern, Gressman, Shapiro & Geller, *Supreme Court Practice* 502 (7th ed. 1993).

## III. APPLICATION OF THE ACT IN THIS CASE IS NOT A SUSPENSION OF THE WRIT OF HABEAS CORPUS

The Suspension Clause of the Constitution, Art. I, § 9, Cl. 2, provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Because there is currently no "Rebellion or Invasion," a suspension of the writ at this time would be unconstitutional. The question presented here is whether Title I of the Act, as applied to this case, so vitiates petitioner's right to obtain habeas corpus relief that it amounts to such a suspension. In light of the historic limitations imposed by Congress and decisions of this Court on second and successive petitions for habeas corpus, the restrictions placed by the Act on petitioner's second or successive habeas corpus petition do not violate the Suspension Clause.

**A. The Evolution Of Habeas Corpus Reflects No Absolute Protection Under The Suspension Clause For A State Prisoner's Claim For Relief Based On Procedural Errors At His Trial Raised On A Second Or Successive Habeas Application**

1. This Court noted in *McCleskey* v. *Zant*, 499 U.S. 467 (1991), that, "[i]n the early decades of our new federal system, English common law defined the substantive scope of the writ." *Id.* at 478 (citing *Ex parte Watkins*, 28 U.S. (3 Pet.) 193 (1830)). Under the common law, "prisoners could use the writ to challenge confinement imposed by a court that lacked jurisdiction, or detention by the Executive without proper legal process." *Ibid.* (citation omitted). Accord *Schlup* v. *Delo*, 115 S. Ct. 851, 862 (1995) ("[T]he writ originally performed only the narrow function of testing either the jurisdiction of the sentencing court or the legality of Executive detention.").

In *Ex parte Watkins*, 28 U.S. (3 Pet.) 193 (1830), the Court stated that the term "habeas corpus" is "used in the constitution, as one which was well understood." *Id.* at 201. Under that understanding, the "great object" of the writ is "the liberation of those who may be imprisoned without sufficient cause." *Id.* at 202. Addressing the question whether "the judgment of a court of competent jurisdiction * * * is * * * in itself sufficient cause," *ibid.*, the Court explained:

> A judgment, in its nature, concludes the subject on which it is rendered, and pronounces the law of the case. The judgment of a court of record, whose jurisdiction is final, is as conclusive on all the world as the judgment of this court would be. It is as conclusive on this court, as it is on other courts. It puts an end to inquiry concerning the fact, by deciding it.



*Id.* at 202-203. See also *Ex parte Kearney*, 20 U.S. (7 Wheat.) 38, 42-43 (1822).

This Court has repeatedly reaffirmed its understanding that postconviction habeas relief was available at common law only to test the jurisdiction of the committing court. See, *e.g.*, *Preiser* v. *Rodriguez*, 411 U.S. 475, 485 (1973) (Under "[t]he original view," the "relevant inquiry was confined to determining simply whether or not the committing court had been possessed of jurisdiction."); *United States* v. *Hayman*, 342 U.S. 205, 211 (1952) ("at common law a judgment of conviction rendered by a court of general criminal jurisdiction was conclusive proof that confinement was legal" and "[s]uch a judgment prevented issuance of the writ without more"); *Yerger*, 75 U.S. (8 Wall.) at 101 (writ "did not extend to cases of imprisonment after conviction, under sentences of competent tribunals"). See also *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 254-256 (1973) (Powell, J., concurring); *Sanders* v. *United States*, 373 U.S. 1, 29 (1963) (Harlan, J., dissenting).[14]

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[14] The exception to that line of cases is *Fay* v. *Noia*, 372 U.S. 391 (1963). There, this Court suggested that *Bushell's Case*, 124 Eng. Rep. 1006, 1016 (1670), stands for the proposition that "habeas was available to remedy any kind of governmental restraint contrary to fundamental law." 372 U.S. at 405. In *Bushell's Case*, jurors who acquitted the defendants in a criminal case in contravention of the direction of the court were themselves committed to prison for contempt of court. The jurors were then released on a writ of habeas corpus by the Court of Common Pleas. The failure to obey a court's direction to return a verdict of guilty, however, may not have

2. As a matter of statutory law in this country, Congress provided no federal habeas corpus remedy for prisoners held in state custody until 1867. In the Judiciary Act of 1789, ch. 20, 1 Stat. 73, Congress vested the federal courts with jurisdiction to issue the writ of habeas corpus, but specifically excluded relief at the behest of state prisoners. The Act provided "[t]hat writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify." § 14, 1 Stat. 82. With limited exceptions for narrow classes of cases in 1833 and 1842,[15] state prisoners remained outside of the ambit

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been a possible basis for a contempt citation at the time of *Bushell's Case* or since, see 124 Eng. Rep. at 1012 ("[T]he jury cannot go against [the judge's] direction in law, for he could not direct."), and the scope of review of a contempt citation may have been broader than that of a criminal conviction, because the defendant had no right to jury trial on a contempt citation, see *id.* at 1010 ("The cases [of contempt and felony] are not alike."). It has thus been said that "one searches the *Bushell* opinion in vain for support of the proposition" in *Fay*. Oaks, *Legal History in the High Court—Habeas Corpus*, 64 Mich. L. Rev. 451, 467 (1966).

[15] See Act of Mar. 2, 1833, ch. 57, § 7, 4 Stat. 634-635 (extending relief to prisoners "committed or confined on, or by any authority or law, for any act done, or omitted, to be done, in pursuance of a law of the United States, or any order, process, or decree, of any judge or court thereof"); Act of Aug. 29, 1842, ch. 257, 5 Stat. 539-540 (extending relief to prisoners who are "subjects or citizens of a foreign State, and domiciled therein," and held under state law).



of federal habeas relief for 78 years, until Congress expanded the scope of habeas relief in 1867.[16]

3. Although the Court has referred to the Suspension Clause from time to time, it has been the subject of only one decision of this Court. *Swain* v. *Pressley*, 430 U.S. 372 (1977). That case involved a Suspension Clause challenge to a statute that abolished habeas review for prisoners in custody under sentences imposed by the District of Columbia Superior Court. In its place, Congress substituted a procedure for postconviction relief in the local (*i.e.*, non-Article III) courts, followed by the possibility of this Court's review on certiorari of the results of that process. This Court upheld the constitutionality of the statute, explaining "that the substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention does not constitute a suspension of the writ of habeas corpus." *Id.* at 381. Cf. *United States* v. *Hayman*, 342 U.S. at 223 (holding that 28 U.S.C. 2255 motion in district of conviction is adequate substitute for habeas corpus for federal prisoners).

In *Swain*, the United States argued that "the Constitution's history shows that the framers did not understand the privilege [of the writ of habeas corpus] to extend to collateral attacks upon criminal convictions. Accordingly, limitations upon the nature and scope of post-conviction collateral relief do not implicate the Suspension Clause." Brief for the Peti-

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[16] See Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385 (extending habeas relief to "all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States").

tioners at 63 (No. 75-811); see *Swain*, 430 U.S. at 380 ("The Government * * * contends that the constitutional provision merely prohibits suspension of the writ as it was being used when the Constitution was adopted; at that time the writ was not employed in collateral attacks on judgments entered by courts of competent jurisdiction."). The Court, however, did not reach that issue in *Swain*, because it was able to rest its decision on a narrower ground, *i.e.*, that Congress had provided an adequate and effective substitute postconviction remedy for the habeas remedy that it had withdrawn for District of Columbia prisoners. *Id.* at 381.

As in *Swain*, it is again unnecessary to consider whether the Suspension Clause is limited to protecting the writ as it existed in 1789.[17] Similarly, it is

[17] That issue would require resolution of several difficult issues. First, it would call for resolution of the "divergent discussions of the historic role of federal habeas corpus" voiced by commentators. *Wainwright* v. *Sykes*, 433 U.S. 72, 77 n.6 (1977). Second, it would require analysis of the meaning of "jurisdiction" in habeas law. While the Court has often stated that, at common law, a habeas court had no authority to issue the writ for a prisoner confined under the judgment of a court of competent jurisdiction, the concept of "jurisdiction" itself in the cases construing the federal habeas statute was the subject of considerable growth and evolution. See, *e.g.*, *McClesky* v. *Zant*, 499 U.S. at 478-479; *Wainwright* v. *Sykes*, 433 U.S. at 79; cf. *Custis* v. *United States*, 114 S. Ct. 1732, 1738 (1994); *id.* at 1745 (Souter, J., dissenting). It is open to debate how much of that evolution might be protected under the Suspension Clause. Third, to the extent that modern practice might be protected, it would implicate the debate about the precise relationship "between the classical common-law writ of habeas corpus and the remedy provided in 28 U.S.C. § 2254"—an issue that has occasioned "[s]harp division within the Court * * * on more than one aspect of the perplexing problems which have been litigated in this connection." *Wainwright* v. *Sykes*, 433 U.S. at 78.



unnecessary to consider whether, in view of Congress's failure to authorize any general right of federal habeas corpus for state prisoners from the founding of this Nation until 1867, the Suspension Clause can be read to afford *any* protection to state prisoners. Compare, *e.g.*, Jordan Steiker, *Incorporating the Suspension Clause: Is There A Constitutional Right To Federal Habeas Corpus For State Prisoners*, 92 Mich. L. Rev. 862, 865, 893 (1994) (supporting expansive right of habeas corpus in the federal courts, but indicating that the Suspension Clause, as originally framed, was not intended to and did not protect the right of state prisoners to obtain federal habeas relief), with James Liebman & Randy Hertz, *Federal Habeas Corpus Practice and Procedure* 35, 40, 74 & n.313 (2d ed. 1994 & Supp. 1995) (theorizing that the Judiciary Act's provision of review of state prisoners' convictions by writ of error in the Supreme Court, see Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 85-87, was an adequate substitute for habeas relief and thereby satisfied the Suspension Clause).[18]

[18] We note that it is doubtful that the theory of Liebman and Hertz could be of any assistance to petitioner, who—like a state prisoner under the Judiciary Act of 1789—has already had the opportunity for Supreme Court review (albeit by writ of certiorari, not appeal) of his criminal conviction and his state habeas proceeding. A comparable form of review was available in *Swain*, and the procedures in that case were held sufficient to satisfy the Suspension Clause. 430 U.S. at 382 n.16.

The Court need not reach those issues here, because petitioner is pursuing a second or successive habeas petition that the Act bars based on reasonable principles of finality. Such principles have long been a feature of federal habeas law, and have never been thought inconsistent with the Constitution. Thus, as we explain below, the application of the Act in this case does not violate the Suspension Clause.

### B. The Suspension Clause Does Not Require The Federal Courts To Provide An Unregulated Opportunity For Habeas Relief On Second Or Successive Petitions

Petitioner is pursuing a second, not a first, federal habeas petition. Cf. *Lonchar* v. *Thomas*, 116 S. Ct. 1293 (1996). This Court and Congress have long recognized that principles of finality have an important role to play in habeas corpus litigation. The content of those principles has varied over time, and the Act once again alters the standards applicable to second and successive petitions. Nonetheless, the consistent recognition by this Court and Congress that principles of finality are applicable to habeas litigation demonstrates that the Act's further refinement of those principles, in the context of this case, does not violate the Suspension Clause.

Petitioner advances two substantive claims. First, he alleges that the jury instructions at his trial were erroneous, because they misdefined the "beyond a reasonable doubt" standard, thereby permitting the jury to convict on the basis of a lighter burden of proof. Pet. 13-21. Second, he alleges that the evidence presented by a state employee regarding the time of death of the victim was inadmissible. Pet.



21-32. He seeks leave to litigate both of those claims in a second federal habeas petition. The court of appeals held that the Act bars those claims. That result does not infringe the Suspension Clause.

1. As this Court has recognized, principles of res judicata did not apply to habeas corpus at common law, and a habeas petition, once denied by one court, "could be made to every other judge or court in the realm, and each court or judge was bound to consider the question of the prisoner's right to a discharge independently, and not to be influenced by the previous decisions refusing discharge." *McCleskey* v. *Zant*, 499 U.S. at 479 (quoting W. Church, *Writ of Habeas Corpus* § 386, at 570 (2d ed. 1893)); see also *Sanders* v. *United States*, 373 U.S. 1, 7 (1963). The reason for such a liberal rule was that the denial of a habeas petition was not considered appealable. Therefore, successive habeas petitions to a different (usually, higher) court had to do the service of an appeal.

After appellate review of habeas decisions became available in this country, some lower courts began to question the validity of the common law rule allowing indefinite numbers of successive petitions. See *McCleskey*, 499 U.S. at 479-480; *Ex parte Cuddy*, 40 F. 62 (C.C.S.D. Cal. 1889) (Field, Circuit Justice). Recognizing that it was departing from the common law rule, the Court in *Salinger* v. *Loisel*, 265 U.S. 224, 230-231 (1924), explained that, "when a refusal to discharge was not open to appellate review, courts and judges were accustomed to exercise an independent judgment on each successive application, regardless of the number." "[W]hen," however, "a right to an appellate review was given the reason

for that practice ceased and the practice came to be materially changed." *Id.* at 231. The Court held, therefore, that "a sound judicial discretion" controls the decision whether to permit a second or successive application, and that "[a]mong the matters which may be considered, and even given controlling weight, are (a) the existence of another remedy, such as a right in ordinary course to an appellate review in the criminal case, and (b) a prior refusal to discharge on a like application." *Ibid.* See also *Wong Doo* v. *United States*, 265 U.S. 239, 241 (1924) (holding that in some circumstances discretion must be exercised to deny a successive petition as abusive); cf. *Price* v. *Johnston*, 334 U.S. 266, 289 (1948) (more flexible standard applied to new claim raised in second or subsequent petition).

When Congress enacted the revision of the Judicial Code in 1948, it codified the result in *Salinger* and *Wong Doo* in former 28 U.S.C. 2244. That statute provided that "[n]o circuit or district judge shall be required to entertain an application for a writ of habeas corpus * * * if it appears that the legality of [the applicant's] detention has been determined * * * on a prior application * * * and the petition presents no new ground * * * and the judge or court is satisfied that the ends of justice will not be served by such inquiry." Act of June 25, 1948, ch. 646, § 1, 62 Stat. 965 (codified at 28 U.S.C. 2244 (1952)).

2. In *Sanders* v. *United States*, 373 U.S. 1 (1963), this Court distinguished between "successive" petitions, which present claims already raised in a previous federal habeas petition, and "abusive" petitions, which present claims that have not previously been raised in a federal habeas petition. The Court held that successive petitions are governed by the "ends



of justice" inquiry derived from *Salinger* and codified in then-Section 2244, see 373 U.S. at 12, 17, while a petition will be found to be abusive only if the government can demonstrate, under traditional equitable principles, that the "suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks," *id.* at 17.

In 1966, following *Sanders*, Congress provided that "a subsequent application for a writ of habeas corpus * * * need not be entertained" unless it is "predicated on a * * * ground not adjudicated on the hearing of the earlier application" and "the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ." Act of Nov. 2, 1966, Pub. L. No. 89-711, § 1, 80 Stat. 1104. Congress's purpose in adopting that amendment was "to introduce 'a greater degree of finality of judgments in habeas corpus proceedings.'" *Kuhlmann* v. *Wilson*, 477 U.S. 436, 450 (1986) (plurality opinion) (quoting S. Rep. No. 1797, 89th Cong., 2d Sess. 2 (1966)). Rule 9(b) of the Rules Governing Section 2254 Cases, which was enacted by Congress in 1976, Act of July 8, 1976, Pub. L. No. 94-349, § 2, 90 Stat. 822, as amended by Act of Sept. 28, 1976, Pub. L. No. 94-426, § 2(8), 90 Stat. 1335, similarly provides that "[a] second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ."

Following the 1966 amendment to Section 2244 and the 1976 enactment of Rule 9(b), this Court

clarified the standards imposed by those provisions for second and successive petitions. As the Court summarized, "[u]nless a habeas petitioner shows cause and prejudice, a court may not reach the merits of: (a) *successive claims* that raise grounds identical to grounds heard and decided on the merits in a previous petition, [or] (b) new claims, not previously raised, which constitute an *abuse of the writ*." *Sawyer* v. *Whitley*, 505 U.S. 333, 338 (1992) (citations omitted). A federal court may hear a second or subsequent claim that fails to satisfy those standards only if the prisoner "establish[es] that under the probative evidence he has a colorable claim of factual innocence." *Id.* at 339 (quoting *Kuhlmann* v. *Wilson*, 477 U.S. at 454 (plurality opinion)); see also *Schlup* v. *Delo*, 115 S. Ct. 851, 867 (1995).

3. In view of the above, the Suspension Clause cannot be read to prohibit the application of reasonable principles of finality to habeas corpus petitions. While successive petitions were permitted under the common law because of the absence of appellate review of habeas decisions, when appellate review became available and the scope of the writ changed, Congress and this Court both applied new principles of finality to the writ without any suggestion that to do so violated the Suspension Clause. Indeed, even the *Sanders* decision itself, which briefly adverted to the possibility of a constitutional issue if habeas relief were limited by strict notions of res judicata, see 373 U.S. at 8, 11-12, recognized that habeas petitions may be dismissed for failure to comport with principles of finality that would have been unknown at common law. *Id.* at 15-16. Since *Sanders*, actions by both Congress and this Court have reinforced that conclusion.



Title I of the Act once again alters the principles of finality applicable to habeas petitions. Before the Act, once the government had pleaded abuse of the writ, a prisoner like petitioner who sought to bring a second habeas petition advancing claims not advanced on his first habeas petition would have to make one of two showings. Either he would have to establish "cause for failing to raise [his claim in previous petitions] and prejudice therefrom," *McCleskey*, 499 U.S. at 494, or he would have to "show that a fundamental miscarriage of justice would result from a failure to entertain the claim," *id.* at 495. The Court has said that the latter requirement is satisfied by a 'colorable showing of factual innocence." *Ibid.* (quoting *Kuhlmann* v. *Wilson*, 477 U.S. at 454 (plurality opinion)).

The Act modifies the judicially established requirements that a second or subsequent habeas petition must satisfy; it reflects Congress's balancing of the competing policy considerations. Cf. *Lonchar* v. *Thomas*, 116 S. Ct. at 1298 ("These legal principles [regarding the availability of habeas] are embodied in statutes, rules, precedents, and practices that control the writ's exercise. Within constitutional constraints they reflect a balancing of objectives (sometimes controversial), which is normally for Congress to make, but which courts will make when Congress has not resolved the question."). The Act sets forth two sets of requirements in the alternative, each of which has a "cause" and a "prejudice" component.

*First*, under Section 106(b)(2)(A), a petitioner may bring a second or successive habeas petition based on a "new rule of constitutional law" that was "previously unavailable" (cause). He must also show a form of prejudice—that the rule he seeks to invoke

was "made retroactive to cases on collateral review by the Supreme Court," *i.e.*, a showing that the new constitutional rule is so fundamental that it is available to a petitioner on postconviction collateral review. See *Teague* v. *Lane*, 489 U.S. 288, 311-314 (1989) (plurality opinion).

*Second*, under Section 106(b)(2)(B), a petitioner may bring a second or successive habeas petition based on newly discovered facts if "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence" (cause) and if "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense" (prejudice).[19]

4. Those requirements of Section 106, as applied to petitioner's claims, do not violate the Suspension Clause. As shown above, the requirements of the Act are parallel to, though different from, the requirements of prior law. Those requirements provide a generally reasonable formulation of finality principles. Their application to the claims asserted by petitioner raises no Suspension Clause problems.[20]

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[19] Section 106(b)(2)(B) also adopts the *Sawyer* v. *Whitley* "clear and convincing" standard rather than the *Schlup* v. *Delo* "probably resulted" standard for measuring the likelihood of actual innocence. See *Sawyer*, 505 U.S. at 348-350; *Schlup*, 115 S. Ct. at 866-867.

[20] No Suspension Clause issue is posed by Section 106(b)(3)(E)'s preclusion of Supreme Court review of a court of appeals' refusal to permit the filing of a second or successive petition in district court. It has been clear since *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807), that the existence of original habeas jurisdiction in the Supreme Court is sufficient to satisfy the requirements of the Suspension Clause. Because the Act provides for such jurisdiction even in cases in which the court of appeals refuses to permit the petitioner to file a second or successive habeas petition in district court, see Section II.A, *supra*, the preclusion of Supreme Court review of the court of appeals' decision is of no consequence under the Suspension Clause.



The court of appeals held that Section 106(b) bars petitioner's claim that the jury instructions were constitutionally erroneous because they diluted the "beyond a reasonable doubt" standard. Pet. App. 25-26. As the court of appeals explained, that claim was certainly available to petitioner on his first federal habeas petition, *ibid.*, and it was also available on direct review of his conviction. Although Congress may choose to permit such a bypassed claim to be adjudicated on its merits on a second federal habeas petition, nothing in the Suspension Clause requires that it permit that kind of disregard of ordinary principles of finality.

Petitioner's other claim is that he is actually innocent, as shown by new affidavits prepared by newly hired experts, and that his trial violated the Eighth and Fourteenth Amendments because a non-physician agent of the State was permitted to testify regarding the date on which the victim died. Pet. 21-32. Although petitioner may not have gathered the precise affidavits that he now presents to the federal courts, he had ample opportunity to gather, and in fact did gather, at the time of his trial substantial other evidence regarding the date of death issue, which he presented to the jury. Pet. App. 31-33. Because ordinary and reasonable principles of finality are entirely consistent with the Suspension Clause, Congress may refuse to permit collateral relitigation of such

routine factual issues based on the kind of entirely cumulative evidence that petitioner presents. Similarly, insofar as petitioner's claim is that the trial court made erroneous—or even constitutionally impermissible—evidentiary rulings, he had the opportunity to litigate his claims regarding those rulings on direct review, on his first state habeas petition, and on his first federal habeas petition. See Pet. App. 25-26. Again, although Congress could permit complete disregard of ordinary rules of finality on habeas corpus, nothing in the Suspension Clause requires Congress to permit a defendant who does not make an available claim of this sort in a prior proceeding to demand an adjudication on the merits on a second federal habeas petition.

## CONCLUSION

The petition for a writ of certiorari should be dismissed.

Respectfully submitted.

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## APPENDIX

### CONSTITUTIONAL AND STATUTORY PROVISIONS

1. Article I, Section 9, Clause 2, of the U.S. Constitution (the Suspension Clause), provides:

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

2. Article III of the U.S. Constitution provides, in relevant part:

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

* * * * *

3. Title I of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1217, provides:

TITLE I—HABEAS CORPUS REFORM



SEC. 101. FILING DEADLINES

Section 2244 of title 28, United States Code, is amended by adding at the end the following new subsection:

"(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a



State court. The limitation period shall run from the latest of—

"(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

"(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

"(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

"(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

"(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.".

SEC. 102. APPEAL.

Section 2253 of title 28, United States Code, is amended to read as follows:

"Sec. 2253. Appeal

"(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the

final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

"(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

"(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

"(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

"(B) the final order in a proceeding under section 2255.

"(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

"(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).".

SEC. 103. AMENDMENT OF FEDERAL RULES OF APPELLATE PROCEDURE.

Rule 22 of the Federal Rules of Appellate Procedure is amended to read as follows:

"Rule 22. Habeas corpus and section 2255 proceedings

"(a) APPLICATION FOR THE ORIGINAL WRIT.—An application for a writ of habeas corpus



shall be made to the appropriate district court. If application is made to a circuit judge, the application shall be transferred to the appropriate district court. If an application is made to or transferred to the district court and denied, renewal of the application before a circuit judge shall not be permitted. The applicant may, pursuant to section 2253 of title 28, United States Code, appeal to the appropriate court of appeals from the order of the district court denying the writ.

"(b) CERTIFICATE OF APPEALABILITY.—In a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court, an appeal by the applicant for the writ may not proceed unless a district or a circuit judge issues a certificate of appealability pursuant to section 2253(c) of title 28, United States Code. If an appeal is taken by the applicant, the district judge who rendered the judgment shall either issue a certificate of appealability or state the reasons why such a certificate should not issue. The certificate or the statement shall be forwarded to the court of appeals with the notice of appeal and the file of the proceedings in the district court. If the district judge has denied the certificate, the applicant for the writ may then request issuance of the certificate by a circuit judge. If such a request is addressed to the court of appeals, it shall be deemed addressed to the judges thereof and shall be considered by a circuit judge or judges as the court deems appropriate. If no express request for a certificate is filed, the notice of appeal shall be deemed to constitute a request addressed to the judges of the court of appeals. If an appeal is taken by a State or its representative, a certificate of appealability is not required.".

SEC. 104. SECTION 2254 AMENDMENTS.

Section 2254 of title 28, United States Code, is amended—

(1) by amending subsection (b) to read as follows:

"(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

"(A) the applicant has exhausted the remedies available in the courts of the State; or

"(B)(i) there is an absence of available State corrective process; or

"(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

"(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

"(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.";

(2) by redesigning subsections (d), (e), and (f) as subsections (e), (f), and (g), respectively;

(3) by inserting after subsection (c) the following new subsection:

"(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the



merits in State court proceedings unless the adjudication of the claim—

"(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

"(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.";

(4) by amending subsection (e), as redesignated by paragraph (2), to read as follows:

"(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

"(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

"(A) the claim relies on—

"(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

"(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

"(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."; and

(5) by adding at the end the following new subsections:

"(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

"(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.".

SEC. 105. SECTION 2255 AMENDMENTS.

Section 2255 of title 28, United States Code, is amended—

(1) by striking the second and fifth undesignated paragraphs; and

(2) by adding at the end the following new undesignated paragraphs:

"A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

"(1) the date on which the judgment of conviction becomes final;



"(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action:

"(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

"(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

"Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

"A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

"(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

"(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.".

SEC. 106. LIMITS ON SECOND OR SUCCESSIVE APPLICATIONS.

(a) CONFORMING AMENDMENT TO SECTION 2244(a).—Section 2244(a) of title 28, United States Code, is amended by striking "and the petition" and all that follows through "by such inquiry." and inserting ", except as provided in section 2255.".

(b) LIMITS ON SECOND OR SUCCESSIVE APPLICATIONS.—Section 2244(b) of title 28, United States Code, is amended to read as follows:

"(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

"(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

"(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

"(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

"(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

"(3)(A) Before a second or successive application permitted by this section is filed in the district court,



the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

"(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

"(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

"(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

"(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

"(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.".

SEC. 107. DEATH PENALTY LITIGATION PROCEDURES.

(a) ADDITION OF CHAPTER TO TITLE 28, UNITED STATES CODE.—Title 28, United States Code, is amended by inserting after chapter 153 the following new chapter:

"CHAPTER 154—SPECIAL HABEAS CORPUS PROCEDURES IN CAPITAL CASES



"Sec. 2261. Prisoners in State custody subject to capital sentence; appointment of counsel; requirement of rule of court or statute; procedures for appointment.

"(a) This chapter shall apply to cases arising under section 2254 brought by prisoners in State custody who are subject to a capital sentence. It shall apply only if the provisions of subsections (b) and (c) are satisfied.

"(b) This chapter is applicable if a State establishes by statute, rule of its court of last resort, or by another agency authorized by State law, a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners whose capital convictions and sentences have been upheld on direct appeal to the court of last resort in the State or have otherwise become final for



State law purposes. The rule of court or statute must provide standards of competency for the appointment of such counsel.

"(c) Any mechanism for the appointment, compensation, and reimbursement of counsel as provided in subsection (b) must offer counsel to all State prisoners under capital sentence and must provide for the entry of an order by a court of record—

"(1) appointing one or more counsels to represent the prisoner upon a finding that the prisoner is indigent and accepted the offer or is unable competently to decide whether to accept or reject the offer;

"(2) finding, after a hearing if necessary, that the prisoner rejected the offer of counsel and made the decision with an understanding of its legal consequences; or

"(3) denying the appointment of counsel upon a finding that the prisoner is not indigent.

"(d) No counsel appointed pursuant to subsections (b) and (c) to represent a State prisoner under capital sentence shall have previously represented the prisoner at trial or on direct appeal in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.

"(e) The ineffectiveness or incompetence of counsel during State or Federal post-conviction proceedings in a capital case shall not be a ground for relief in a proceeding arising under section 2254. This limitation shall not preclude the appointment of different counsel, on the court's own motion or at the request of the prisoner, at any phase of State or Federal post-conviction proceedings on the basis of the ineffectiveness or incompetence of counsel in such proceedings.

"Sec. 2262. Mandatory stay of execution; duration; limits on stays of execution; successive petitions.

"(a) Upon the entry in the appropriate State court of record of an order under section 2261(c), a warrant or order setting an execution date for a State prisoner shall be stayed upon application to any court that would have jurisdiction over any proceedings filed under section 2254. The application shall recite that the State has invoked the post-conviction review procedures of this chapter and that the scheduled execution is subject to stay.

"(b) A stay of execution granted pursuant to subsection (a) shall expire if—

"(1) a State prisoner fails to file a habeas corpus application under section 2254 within the time required in section 2263;

"(2) before a court of competent jurisdiction, in the presence of counsel, unless the prisoner has competently and knowingly waived such counsel, and after having been advised of the consequences, a State prisoner under capital sentence waives the right to pursue habeas corpus review under section 2254; or

"(3) a State prisoner files a habeas corpus petition under section 2254 within the time required by section 2263 and fails to make a substantial showing of the denial of a Federal right or is denied relief in the district court or at any subsequent stage of review.

"(c) If one of the conditions in subsection (b) has occurred, no Federal court thereafter shall have the authority to enter a stay of execution in the case, unless the court of appeals approves the filing of a second or successive application under section 2244(b).



"Sec. 2263. Filing of habeas corpus application; time requirements; tolling rules

"(a) Any application under this chapter for habeas corpus relief under section 2254 must be filed in the appropriate district court not later than 180 days after final State court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review.

"(b) The time requirements established by subsection (a) shall be tolled—

"(1) from the date that a petition for certiorari is filed in the Supreme Court until the date of final disposition of the petition if a State prisoner files the petition to secure review by the Supreme Court of the affirmance of a capital sentence on direct review by the court of last resort of the State or other final State court decision on direct review;

"(2) from the date on which the first petition for post-conviction review or other collateral relief is filed until the final State court disposition of such petition; and

"(3) during an additional period not to exceed 30 days, if—

"(A) a motion for an extension of time is filed in the Federal district court that would have jurisdiction over the case upon the filing of a habeas corpus application under section 2254; and

"(B) a showing of good cause is made for the failure to file the habeas corpus application within the time period established by this section.

"Sec. 2264. Scope of Federal review; district court adjudications

"(a) Whenever a State prisoner under capital sentence files a petition for habeas corpus relief to which this chapter applies, the district court shall only consider a claim or claims that have been raised and decided on the merits in the State courts, unless the failure to raise the claim properly is—

"(1) the result of State action in violation of the Constitution or laws of the United States;

"(2) the result of the Supreme Court's recognition of a new Federal right that is made retroactively applicable; or

"(3) based on a factual predicate that could not have been discovered through the exercise of due diligence in time to present the claim for State or Federal post-conviction review.

"(b) Following review subject to subsections (a), (d), and (e) of section 2254, the court shall rule on the claims properly before it.

"Sec. 2265. Application to State unitary review procedure

"(a) For purposes of this section, a 'unitary review' procedure means a State procedure that authorizes a person under sentence of death to raise, in the course of direct review of the judgment, such claims as could be raised on collateral attack. This chapter shall apply, as provided in this section, in relation to a State unitary review procedure if the State establishes by rule of its court of last resort or by statute a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of com-



petent counsel in the unitary review proceedings, including expenses relating to the litigation of collateral claims in the proceedings. The rule of court or statute must provide standards of competency for the appointment of such counsel.

"(b) To qualify under this section, a unitary review procedure must include an offer of counsel following trial for the purpose of representation on unitary review, and entry of an order, as provided in section 2261(c), concerning appointment of counsel or waiver or denial of appointment of counsel for that purpose. No counsel appointed to represent the prisoner in the unitary review proceedings shall have previously represented the prisoner at trial in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.

"(c) Sections 2262, 2263, 2264, and 2266 shall apply in relation to cases involving a sentence of death from any State having a unitary review procedure that qualifies under this section. References to State 'post-conviction review' and 'direct review' in such sections shall be understood as referring to unitary review under the State procedure. The reference in section 2262(a) to 'an order under section 2261(c)' shall be understood as referring to the post-trial order under subsection (b) concerning representation in the unitary review proceedings, but if a transcript of the trial proceedings is unavailable at the time of the filing of such an order in the appropriate State court, then the start of the 180-day limitation period under section 2263 shall be deferred until a transcript is made available to the prisoner or counsel of the prisoner.

"Sec. 2266. Limitation periods for determining applications and motions

"(a) The adjudication of any application under section 2254 that is subject to this chapter, and the adjudication of any motion under section 2255 by a person under sentence of death, shall be given priority by the district court and by the court of appeals over all noncapital matters.

"(b)(1)(A) A district court shall render a final determination and enter a final judgment on any application for a writ of habeas corpus brought under this chapter in a capital case not later than 180 days after the date on which the application is filed.

"(B) A district court shall afford the parties at least 120 days in which to complete all actions, including the preparation of all pleadings and briefs, and if necessary, a hearing, prior to the submission of the case for decision.

"(C)(i) A district court may delay for not more than one additional 30-day period beyond the period specified in subparagraph (A), the rendering of a determination of an application for a writ of habeas corpus if the court issues a written order making a finding, and stating the reasons for the finding, that the ends of justice that would be served by allowing the delay outweigh the best interests of the public and the applicant in a speedy disposition of the application.

"(ii) The factors, among others, that a court shall consider in determining whether a delay in the disposition of an application is warranted are as follows:



"(I) Whether the failure to allow the delay would be likely to result in a miscarriage of justice.

"(II) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate briefing within the time limitations established by subparagraph (A).

"(III) Whether the failure to allow a delay in a case that, taken as a whole, is not so unusual or so complex as described in subclause (II), but would otherwise deny the applicant reasonable time to obtain counsel, would unreasonably deny the applicant or the government continuity of counsel, or would deny counsel for the applicant or the government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

"(iii) No delay in disposition shall be permissible because of general congestion of the court's calendar.

"(iv) The court shall transmit a copy of any order issued under clause (i) to the Director of the Administrative Office of the United States Courts for inclusion in the report under paragraph (5).

"(2) The time limitations under paragraph (1) shall apply to—

"(A) an initial application for a writ of habeas corpus;

"(B) any second or successive application for a writ of habeas corpus; and

"(C) any redetermination of an application for a writ of habeas corpus following a remand by the court of appeals or the Supreme Court for further proceedings, in which case the limitation period shall run from the date the remand is ordered.

"(3)(A) The time limitations under this section shall not be construed to entitle an applicant to a stay of execution, to which the applicant would otherwise not be entitled, for the purpose of litigating any application or appeal.

"(B) No amendment to an application for a writ of habeas corpus under this chapter shall be permitted after the filing of the answer to the application, except on the grounds specified in section 2244(b).

"(4)(A) The failure of a court to meet or comply with a time limitation under this section shall not be a ground for granting relief from a judgment of conviction or sentence.

"(B) The State may enforce a time limitation under this section by petitioning for a writ of mandamus to the court of appeals. The court of appeals shall act on the petition for a writ of mandamus not later than 30 days after the filing of the petition.

"(5)(A) The Administrative Office of the United States Courts shall submit to Congress an annual report on the compliance by the district courts with the time limitations under this section.

"(B) The report described in subparagraph (A) shall include copies of the orders submitted



by the district courts under paragraph (1)(B)(iv).

"(c)(1)(A) A court of appeals shall hear and render a final determination of any appeal of an order granting or denying, in whole or in part, an application brought under this chapter in a capital case not later than 120 days after the date on which the reply brief is filed, or if no reply brief is filed, not later than 120 days after the date on which the answering brief is filed.

"(B)(i) A court of appeals shall decide whether to grant a petition for rehearing or other request for rehearing en banc not later than 30 days after the date on which the petition for rehearing is filed unless a responsive pleading is required, in which case the court shall decide whether to grant the petition not later than 30 days after the date on which the responsive pleading is filed.

"(ii) If a petition for rehearing or reeharing en banc is granted, the court of appeals shall hear and render a final determination of the appeal not later than 120 days after the date on which the order granting rehearing or rehearing en banc is entered.

"(2) The time limitations under paragraph (1) shall apply to—

"(A) an initial application for a writ of habeas corpus;

"(B) any second or successive application for a writ of habeas corpus; and

"(C) any redetermination of an application for a writ of habeas corpus or related appeal following a remand by the court of appeals en

banc or the Supreme Court for further proceedings, in which case the limitation period shall run from the date the remand is ordered.

"(3) The time limitations under this section shall not be construed to entitle an applicant to a stay of execution, to which the applicant would otherwise not be entitled, for the purpose of litigating any application or appeal.

"(4)(A) The failure of a court to meet or comply with a time limitation under this section shall not be a ground for granting relief from a judgment of conviction or sentence.

"(B) The State may enforce a time limitation under this section by applying for a writ of mandamus to the Supreme Court.

"(5) The Administrative Office of the United States Courts shall submit to Congress an annual report on the compliance by the courts of appeals with the time limitations under this section."

(b) TECHNICAL AMENDMENT.—The part analysis for part IV of title 28, United States Code, is amended by adding after the item relating to chapter 153 the following new item:

"154. Special habeas corpus procedures in capital cases ..... 2261.".

(c) EFFECTIVE DATE.—Chapter 154 of title 28, United States Code (as added by subsection (a)) shall apply to cases pending on or after the date of enactment of this Act.



SEC. 108. TECHNICAL AMENDMENT.

Section 408(q) of the Controlled Substances Act (21 U.S.C. 848(q)) is amended by amending paragraph (9) to read as follows:

"(9) Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor under paragraph (10). No ex parte proceeding, communication, or request may be considered pursuant to this section unless a proper showing is made concerning the need for confidentiality. Any such proceeding, communication, or request shall be transcribed and made a part of the record available for appellate review.".

4. Chapters 153 and 154 of Title 28 of the United States Code, as amended (new material italicized and deleted material bracketed), provide:

# UNITED STATES CODE
# TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE
# PART VI—PARTICULAR PROCEEDINGS
# CHAPTER 153—HABEAS CORPUS

Sec.



## § 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective



jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State

which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

**§ 2242. Application**

Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf.

It shall allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority, if known.

It may be amended or supplemented as provided in the rules of procedure applicable to civil actions.

If addressed to the Supreme Court, a justice thereof or a circuit judge it shall state the reasons for not making application to the district court of the district in which the applicant is held.

**§ 2243. Issuance of writ; return; hearing; decision**

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.



The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed. The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts. The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

**§ 2244. Finality of determination**

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has

been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, and the petition presents no new ground not theretofore presented and determined, [and the judge or court is satisfied that the ends of justice will not be served by such inquiry] *except as provided in section 2255.*

[(b) When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.]

*(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.*

*(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—*

*(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or*



*(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and*

*(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.*

*(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.*

*(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.*

*(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.*

*(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.*

*(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.*

*(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.*

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

*(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—*

*(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;*

*(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;*



*(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or*

*(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.*

*(2) The time during which a properly filed application for State post- conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.*

### § 2245. Certificate of trial judge admissible in evidence

On the hearing of an application for a writ of habeas corpus to inquire into the legality of the detention of a person pursuant to a judgment the certificate of the judge who presided at the trial resulting in the judgment, setting forth the facts occurring at the trial, shall be admissible in evidence. Copies of the certificate shall be filed with the court in which the application is pending and in the court in which the trial took place.

### § 2246. Evidence; depositions; affidavits

On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound

written interrogatories to the affiants, or to file answering affidavits.

### § 2247. Documentary evidence

On application for a writ of habeas corpus documentary evidence, transcripts of proceedings upon arraignment, plea and sentence and a transcript of the oral testimony introduced on any previous similar application by or in behalf of the same petitioner, shall be admissible in evidence.

### § 2248. Return or answer; conclusiveness

The allegations of a return to the writ of habeas corpus or of an answer to an order to show cause in a habeas corpus proceeding, if not traversed, shall be accepted as true except to the extent that the judge finds from the evidence that they are not true.

### § 2249. Certified copies of indictment, plea and judgment; duty of respondent

On application for a writ of habeas corpus to inquire into the detention of any person pursuant to a judgment of a court of the United States, the respondent shall promptly file with the court certified copies of the indictment, plea of petitioner and the judgment, or such of them as may be material to the questions raised, if the petitioner fails to attach them to his petition, and same shall be attached to the return to the writ, or to the answer to the order to show cause.

### § 2250. Indigent petitioner entitled to documents without cost

If on any application for a writ of habeas corpus an order has been made permitting the petitioner to



prosecute the application in forma pauperis, the clerk of any court of the United States shall furnish to the petitioner without cost certified copies of such documents or parts of the record on file in his office as may be required by order of the judge before whom the application is pending.

### § 2251. Stay of State court proceedings

A justice or judge of the United States before whom a habeas corpus proceeding is pending, may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding.

After the granting of such a stay, any such proceeding in any State court or by or under the authority of any State shall be void. If no stay is granted, any such proceeding shall be as valid as if no habeas corpus proceedings or approval were pending.

### § 2252. Notice

Prior to the hearing of a habeas corpus proceeding in behalf of a person in custody of State officers or by virtue of State laws notice shall be served on the attorney general or other appropriate officer of such State as the justice or judge at the time of issuing the writ shall direct.

### § 2253. Appeal

[In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to re-

view, on appeal, by the court of appeals for the circuit where the proceeding is had.

There shall be no right of appeal from such an order in a proceeding to test the validity of a warrant to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his detention pending removal proceedings.

An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause.]

*(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.*

*(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.*

*(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—*

*(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or*

*(B) the final order in a proceeding under section 2255.*



*(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.*

*(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).*

**§ 2254. State custody; remedies in Federal courts**

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

[(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.]

*(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—*

*(A) the applicant has exhausted the remedies available in the courts of the State; or*

*(B)(i) there is an absence of available State corrective process; or*

*(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.*

*(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.*

*(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.*

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

*(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—*

*(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or*

*(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.*

[(d)] (*e*) [In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment



of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the

record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in pargraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.]

*(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.*

*(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—*

*(A) the claim relies on—*

*(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or*



*(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and*

*(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.*

[(e)] *(f)* If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

[(f)] *(g)* A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

*(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an ap-*

*plicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.*

*(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.*

### § 2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

[A motion for such relief may be made at any time.]

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional



rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

[The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.]

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

*A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—*

*(1) the date on which the judgment of conviction becomes final;*

*(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;*

*(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or*

*(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.*

*Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.*

*A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—*

*(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or*

*(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.*



## *CHAPTER 154—SPECIAL HABEAS CORPUS PROCEDURES IN CAPITAL CASES*

*Sec.*



### § 2261. Prisoners in State custody subject to capital sentence; appointment of counsel; requirement of rule of court or statute; procedures for appointment

*(a) This chapter shall apply to cases arising under section 2254 brought by prisoners in State custody who are subject to a capital sentence. It shall apply only if the provisions of subsections (b) and (c) are satisfied.*

*(b) This chapter is applicable if a State establishes by statute, rule of its court of last resort, or by another agency authorized by State law, a mechanism for the appointment, compensation, and payment of*

*reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners whose capital convictions and sentences have been upheld on direct appeal to the court of last resort in the State or have otherwise become final for State law purposes. The rule of court or statute must provide standards of competency for the appointment of such counsel.*

*(c) Any mechanism for the appointment, compensation, and reimbursement of counsel as provided in subsection (b) must offer counsel to all State prisoners under capital sentence and must provide for the entry of an order by a court of record—*

*(1) appointing one or more counsels to represent the prisoner upon a finding that the prisoner is indigent and accepted the offer or is unable competently to decide whether to accept or reject the offer;*

*(2) finding, after a hearing if necessary, that the prisoner rejected the offer of counsel and made the decision with an understanding of its legal consequences; or*

*(3) denying the appointment of counsel upon a finding that the prisoner is not indigent.*

*(d) No counsel appointed pursuant to subsections (b) and (c) to represent a State prisoner under capital sentence shall have previously represented the prisoner at trial or on direct appeal in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.*

***(e) The ineffectiveness or incompetence of counsel during State or Federal post-conviction proceedings in a capital case shall not be a ground for relief in***



***a proceeding arising under section 2254. This limitation shall not preclude the appointment of different counsel, on the court's own motion or at the request of the prisoner, at any phase of State or Federal post-conviction proceedings on the basis of the ineffectiveness or incompetence of counsel in such proceedings.***

**§ 2262. Mandatory stay of execution; duration; limits on stays of execution; successive petitions**

***(a) Upon the entry in the appropriate State court of record of an order under section 2261(c), a warrant or order setting an execution date for a State prisoner shall be stayed upon application to any court that would have jurisdiction over any proceedings filed under section 2254. The application shall recite that the State has invoked the post-conviction review procedures of this chapter and that the scheduled execution is subject to stay.***

***(b) A stay of execution granted pursuant to subsection (a) shall expire if—***

***(1) a State prisoner fails to file a habeas corpus application under section 2254 within the time required in section 2263;***

***(2) before a court of competent jurisdiction, in the presence of counsel, unless the prisoner has competently and knowingly waived such counsel, and after having been advised of the consequences, a State prisoner under capital sentence waives the right to pursue habeas corpus review under section 2254; or***

***(3) a State prisoner files a habeas corpus petition under section 2254 within the time required by section 2263 and fails to make a substantial showing of the denial of a Federal right***

*or is denied relief in the district court or at any subsequent stage of review.*

*(c) If one of the conditions in subsection (b) has occurred, no Federal court thereafter shall have the authority to enter a stay of execution in the case, unless the court of appeals approves the filing of a second or successive application under section 2244(b).*

**§ 2263. Filing of habeas corpus application; time requirements; tolling rules**

*(a) Any application under this chapter for habeas corpus relief under section 2254 must be filed in the appropriate district court not later than 180 days after final State court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review.*

*(b) The time requirements established by subsection (a) shall be tolled—*

*(1) from the date that a petition for certiorari is filed in the Supreme Court until the date of final disposition of the petition if a State prisoner files the petition to secure review by the Supreme Court of the affirmance of a capital sentence on direct review by the court of last resort of the State or other final State court decision on direct review;*

*(2) from the date on which the first petition for post-conviction review or other collateral relief is filed until the final State court disposition of such petition; and*

*(3) during an additional period not to exceed 30 days, if—*



*(A) a motion for an extension of time is filed in the Federal district court that would have jurisdiction over the case upon the filing of a habeas corpus application under section 2254; and*

*(B) a showing of good cause is made for the failure to file the habeas corpus application within the time period established by this section.*

**§ 2264. Scope of Federal review; district court adjudications**

*(a) Whenever a State prisoner under capital sentence files a petition for habeas corpus relief to which this chapter applies, the district court shall only consider a claim or claims that have been raised and decided on the merits in the State courts, unless the failure to raise the claim properly is—*

*(1) the result of State action in violation of the Constitution or laws of the United States;*

*(2) the result of the Supreme Court's recognition of a new Federal right that is made retroactively applicable; or*

*(3) based on a factual predicate that could not have been discovered through the exercise of due diligence in time to present the claim for State or Federal post-conviction review.*

*(b) Following review subject to subsections (a), (d) & (e) of section 2254, the court shall rule on the claims properly before it.*

### § 2265. Application to State unitary review procedure

*(a) For purposes of this section, a 'unitary review' procedure means a State procedure that authorizes a person under sentence of death to raise, in the course of direct review of the judgment, such claims as could be raised on collateral attack. This chapter shall apply, as provided in this section, in relation to a State unitary review procedure if the State establishes by rule of its court of last resort or by statute a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in the unitary review proceedings, including expenses relating to the litigation of collateral claims in the proceedings. The rule of court or statute must provide standards of competency for the appointment of such counsel.*

*(b) To qualify under this section, a unitary review procedure must include an offer of counsel following trial for the purpose of representation on unitary review, and entry of an order, as provided in section 2261(c), concerning appointment of counsel or waiver or denial of appointment of counsel for that purpose. No counsel appointed to represent the prisoner in the unitary review proceedings shall have previously represented the prisoner at trial in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.*

*(c) Sections 2262, 2263, 2264, and 2266 shall apply in relation to cases involving a sentence of death from any State having a unitary review procedure that qualifies under this section. References to State 'post-conviction review' and 'direct review' in such sections*



*shall be understood as referring to unitary review under the State procedure. The reference in section 2262(a) to 'an order under section 2261(c)' shall be understood as referring to the post-trial order under subsection (b) concerning representation in the unitary review proceedings, but if a transcript of the trial proceedings is unavailable at the time of the filing of such an order in the appropriate State court, then the start of the 180-day limitation period under section 2263 shall be deferred until a transcript is made available to the prisoner or counsel of the prisoner.*

### § 2266. Limitation periods for determining applications and motions

*(a) The adjudication of any application under section 2254 that is subject to this chapter, and the adjudication of any motion under section 2255 by a person under sentence of death, shall be given priority by the district court and by the court of appeals over all noncapital matters.*

*(b)(1)(A) A district court shall render a final determination and enter a final judgment on any application for a writ of habeas corpus brought under this chapter in a capital case not later than 180 days after the date on which the application is filed.*

*(B) A district court shall afford the parties at least 120 days in which to complete all actions, including the preparation of all pleadings and briefs, and if necessary, a hearing, prior to the submission of the case for decision.*

*(C)(i) A district court may delay for not more than one additional 30-day period beyond*

*the period specified in subparagraph (A), the rendering of a determination of an application for a writ of habeas corpus if the court issues a written order making a finding, and stating the reasons for the finding, that the ends of justice that would be served by allowing the delay outweigh the best interests of the public and the applicant in a speedy disposition of the application.*

*(ii) The factors, among others, that a court shall consider in determining whether a delay in the disposition of an application is warranted are as follows:*

*(I) Whether the failure to allow the delay would be likely to result in a miscarriage of justice.*

*(II) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate briefing within the time limitations established by subparagraph (A).*

*(III) Whether the failure to allow a delay in a case that, taken as a whole, is not so unusual or so complex as described in subclause (II), but would otherwise deny the applicant reasonable time to obtain counsel, would unreasonably deny the applicant or the government continuity of counsel, or would deny counsel for the applicant or the government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.*



*(iii) No delay in disposition shall be permissible because of general congestion of the court's calendar.*

*(iv) The court shall transmit a copy of any order issued under clause (i) to the Director of the Administrative Office of the United States Courts for inclusion in the report under paragraph (5).*

*(2) The time limitations under paragraph (1) shall apply to—*

*(A) an initial application for a writ of habeas corpus;*

*(B) any second or successive application for a writ of habeas corpus; and*

*(C) any redetermination of an application for a writ of habeas corpus following a remand by the court of appeals or the Supreme Court for further proceedings, in which case the limitation period shall run from the date the remand is ordered.*

*(3)(A) The time imitations under this section shall not be construed to entitle an applicant to a stay of execution, to which the application would otherwise not be entitled, for the purpose of litigating any application or appeal.*

*(B) No amendment to an application for a writ of habeas corpus under this chapter shall be permitted after the filing of the answer to the application, except on the grounds specified in section 2244(b).*

*(4)(A) The failure of a court to meet or comply with a time limitation under this section*

*shall not be a ground for granting relief from a judgment of conviction or sentence.*

*(B) The State may enforce a time limitation under this section by petitioning for a writ of mandamus to the court of appeals. The court of appeals shall act on the petition for a writ of mandamus not later than 30 days after the filing of the petition.*

*(5)(A) The Administrative Office of the United States Courts shall submit to Congress an annual report on the compliance by the district courts with the time limitations under this section.*

*(B) The report described in subparagraph (A) shall include copies of the orders submitted by the district courts under paragraph(1)(B)(iv).*

*(c)(1)(A) A court of appeals shall hear and render a final determination of any appeal of an order granting or denying, in whole or in part, an application brought under this chapter in a capital case not later than 120 days after the date on which the reply brief is filed, or if no reply brief is filed, not later than 120 days after the date on which the answering brief is filed.*

*(B)(i) A court of appeals shall decide whether to grant a petition for rehearing or other request for rehearing en banc not later than 30 days after the date on which the petition for rehearing is filed unless a responsive pleading is required, in which case the court shall decide whether to grant the petition not later otherwise not be entitled, for the purpose of litithan 30 days after the date on which the responsive pleading is filed.*



*(ii) If a petition for rehearing or rehearing en banc is granted, the court of appeals shall hear and render a final determination of the appeal not later than 120 days after the date on which the order granting rehearing or rehearing en banc is entered.*

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